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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

BRANDON AUSTIN,) Case No. C17-6028BHS
)
Plaintiff,)
) RESPONSE TO PLAINTIFF'S MOTION
v.) FOR DISCOVERY RELATED
) SANCTIONS
HARBOR FREIGHT TOOLS USA, INC. a)
foreign corporation; JOHN DOES 1-5,) NOTED FOR: JANUARY 11, 2019
)
Defendants.)

**RESPONSE TO PLAINTIFF'S MOTION FOR
DISCOVERY RELATED SANCTIONS (C17-
6028BHS) - 1**

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1 Plaintiff moves the court to sanction Harbor Freight Tools USA, Inc. (hereinafter “Harbor
2 Freight”) for the timely production of an expert report that disagreed with Plaintiff’s own expert
3 report and for Harbor Freight’s alleged failure to produce documents that Plaintiff did not
4 request. Harbor Freight produced documents based on the requests made and defined by the
5 Plaintiff, specifically documents regarding torch SKU 91033. Because there is no violation of
6 the discovery rules, the Court should deny Plaintiff’s Motion.

7 8 **I. ISSUE**

9 Did Harbor Freight fail to provide information or identify a witness as required by
10 Rule 26 (a) or (e) and if so, was that failure substantially justified or harmless? No. Harbor
11 Freight provided the requested information regarding torch SKU 91033, other relevant
12 information and timely identified its expert witness as required by Rule 26(a) or (e).

13 **II. EVIDENCE RELIED UPON**

14 This motion relies upon the Declaration of Robert Spajic, the Declaration of Casper
15 Wypych, the court docket and the prior pleadings filed with the court in this case.

16 **III. RELEVANT FACTS**

17 Plaintiff claims that Harbor Freight is liable for injuries he alleges were caused by a
18 torch, manufactured by a non-party, he allegedly purchased from Amazon.com. Spajic Dec.
19 ¶ 3 and Wypych Dec. ¶3. Plaintiff alleged he purchased “a Greenwood[™] Propane Torch –
20 Item 61589 or 91033.” ECF 1, ¶ 4.1. Plaintiff alleges, and has the burden of proving, that
21 the torch he purchased and used was designed, assembled, manufactured, or sold by Harbor
22 Freight or was marketed under a trade name or brand name of the Harbor Freight, therefore
23 he must prove the identity of the torch. ECF 1, paragraphs 5.2 and 5.10, *Bostwick v. Ballard*
24 *Marine, Inc.*, 127 Wn. App. 762 (2005), *Celotex Corp. v. Catrett*, 477 U.S. 317, 319-320, 106
25 S. Ct. 2548 (1986).

Harbor Freight's first notice of this claim was the filing of the lawsuit. Spajic Dec. ¶4. Because Plaintiff did not purchase the torch from Harbor Freight, Harbor Freight had no basis to know which model of torch was involved. Wypych Dec. ¶2. Harbor Freight did not create the invoice or listing Plaintiff appears to have relied on to identify the torch. Wypych Dec. ¶4. Plaintiff retained the torch since the alleged incident, and there is no evidence it was ever possessed by Harbor Freight before or after the alleged incident. Spajic Dec. ¶5.

Both parties provided initial disclosures on March 19, 2018. Spajic Dec. ¶7. Harbor Freight indicated that the relevant documents included an insurance policy and "Non-privileged documents relating to the selection, safety, and distribution of its relevant products." Spajic Dec. Ex. 1. Plaintiff did not object to this disclosure and did not confer with defense counsel regarding any claim that this disclosure was incomplete. Spajic Dec. ¶ 10.

Plaintiff's motion indicates that Harbor Freight has failed to supplement its initial disclosure with responsive materials. Though none of the documents produced have been noted as initial disclosure supplements, Harbor Freight has produced the documents it currently believes will be used to support its claims or defenses. Spajic Dec. ¶ 22.

Plaintiff's Interrogatories and Requests for Production defined "the Product" as follows:

15. The term "the product" as used in these interrogatories shall mean the product which caused injury or damage to the Plaintiff as alleged in Plaintiff's pleadings or as referred to in Interrogatory No. 1 set forth below.

Spajic Dec. Ex. 2. Interrogatory No. 1 stated the following:

INTERROGATORY NO. 1: Did the defendant, or any agent or employee of the defendant design, manufacture, assemble, package, sell, distribute, advertise, install, service, prepare, maintain, or in any way handle the product, as defined above, a description of which is as follows:

- (a) Name: Propane Torch
- (b) SKU: 91033
- (c) Brand: Greenwoodtm
- (d) Shipping Weight: 2.95 lb.
- (e) Fuel Type: Liquid propane

- (f) Color: Blue handle with a black hose
 (g) Hose: Chuan Hseng CHH0251 5/16" L.P./Nat Gas Hose 350 PSIG
 MAX W.P. CAN 1-8.3/UL 21 4Q/16

Spajic Dec. Ex. 2. Harbor Freight's response to these interrogatories and requests for production were as follows:

"Harbor Freight objects to Plaintiff's definition of the 'product' on grounds that the definition includes a legal conclusion (that the product caused injury or damage to Plaintiff) and presumes that Harbor Freight is responsible for the design, manufacture, assembly, sale and various other processes that resulted in introduction of the actual product into the stream of commerce. Harbor Freight also objects to the word 'handle' as ambiguous in a commercial retail setting. [attorney signature omitted]. Subject to and without waiver of the objections, neither Harbor Freight nor any Harbor Freight agent or employee, designed, manufactured, assembled or packaged Greenwood Propane Torch SKU 91033 (the "Torch"). . . "

Spajic Dec. Ex. 3. Harbor Freight responded to the remaining interrogatories and requests for production, with the understanding that the "Torch" was the model expressly defined by Plaintiff as SKU 91033. Spajic Dec. ¶ 15. Plaintiff did not object to Harbor Freight's objections or confer on a motion to compel production of documents other than those produced or defined. Spajic Dec. ¶16. Plaintiff did not clarify his definition of "the product" as different than what Harbor Freight indicated was the subject of its responses, namely the torch defined in Interrogatory No. 1, with SKU 91033.

At the destructive testing, neither Plaintiff nor Plaintiff's expert requested an exemplar torch. Spajic Dec. ¶ 18. Neither Plaintiff nor Plaintiff's expert objected to the lack of a second exemplar torch at the testing or indicated that the testing could not go forward without a second exemplar or an exemplar of the SKU 61589 model or the SKU 91033 model. Spajic Dec. ¶ 18.

Plaintiff's Second Interrogatories and Requests for Production contained the following definition and request:

REQUEST FOR PRODUCTION NO. 7: Plaintiff Brandon

Austin was injured while using a Greenwood Propane Torch (SKU

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91033). The subject torch was packaged as a “kit” that included a hose that attached to a propane tank. Writing on the hose read, “Chuan Hseng CHH0251 5/16” L.P./NAT GAS HOSE 350PSIG MAX.”

Please produce ten (10) similar hoses labeled “Chuan Hseng CHH0251 5/16” L.P./NAT GAS HOSE 350PSIG MAX.” that Harbor Freight Tools sells as part of the “kit” included with its Greenwood Propane Torch (SKU 91033) product.

Spajic Dec. Ex. 4. This request indicates Plaintiff has identified the involved torch as 91033. Harbor Freight responded and produced 10 hoses with the described labeling, even though those hoses were packaged with the SKU 61589 torch, not the 91033 torch. Spajic Dec. ¶ 21.

Harbor Freight supplemented discovery regarding the SKU 61589 model torch on December 20, 2018, after it became clear Plaintiff’s counsel either thought he had already requested that information or was requesting it after Harbor Freight’s expert opinion was disclosed. Spajic Dec. ¶ 21.

IV. ARGUMENT

A. Harbor Freight Disclosed Its Expert Report Within The Time Provided By The Court

FRCP 26(a)(2)(D) requires the disclosure of the identity of an expert and a written report of that expert, “at the times and in the sequence that the court orders” or “[a]bsent a stipulation or a court order” “at least 90 days before the date set for trial.” The Expert Witness Disclosure/Reports date was set for December 7, 2018. ECF 13. Rebuttal reports were set as due on January 4, 2019. ECF 13. The discovery cut off was set as February 14, 2019. ECF 13. This provided more than two months between the initial expert disclosures and the discovery cutoff date.

Plaintiff cites no case or rule which requires the disclosure of expert opinions prior to the date that the court orders. Moreover, “[FRCP] 26(b)(3)(A) and (B) protect

communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications" relate to compensation, identify facts provided by the attorney to the expert, or identify assumptions provided by the attorney to the expert. FRCP 26(b)(4)(C). Opinion work product of counsel developed through communications with the expert is not discoverable, and the expert's opinion is discoverable pursuant to the framework of discovery including expert disclosure deadlines, but not before. *Republic of Ecuador v. Mackay*, 742 F.3d 860, 865, 870 (9th Cir. 2014), *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 234 (2007).

Plaintiff's motion contends that Harbor Freight had a duty to disclose the conclusions of its experts about matters of dispute in the case prior to the expert disclosure deadline. The law imposes no such obligation. The identity of the torch purchased by Plaintiff was an issue of potential fact dispute in this case. Plaintiff acknowledged as much when he pleaded that the involved torch was "Item 61589 or 91033" in paragraph 4.1 of his Complaint. ECF 1. Harbor Freight confirmed that fact question and potential dispute when it requested a product identification examination. Spajic Dec. ¶6. Other than the examination and subsequent expert opinion, Harbor Freight had no way to identify the torch. Wypych Dec. ¶2. Harbor Freight was not in possession of the torch after the alleged incident. Spajic Dec. ¶ 6. Harbor Freight did not sell the torch, and therefore did not create the invoice or product website that Plaintiff relied on in identifying the torch¹. Wypych Dec. ¶ 4. Plaintiff was aware that there were multiple potential identities of the torch and in fact put that issue in its initial pleading. Eventually, Plaintiff identified the documents he wanted in his First and Second Request for Production as related to SKU 91033.

¹ Amazon.com may have mislabeled the torch, but there are no facts to support a claim that this was a deceptive action by Harbor Freight. Harbor Freight did not sell the product on Amazon.com, and does not distribute products via Amazon.com. Harbor Freight had no record of the sale of this product to Plaintiff. Wypych Dec. ¶ 2 and 4.

1 It is not unusual for opposing party's experts to reach opposite conclusions regarding
 2 matters at issue in litigation. However, the discovery rules do not require a party to disclose
 3 its expert opinion early to "correct" a "wrong" opinion it suspects the opposing expert may
 4 have formed. Harbor Freight was not certain of Plaintiff's opinion of the identity of the torch
 5 until December 7, 2018 when the expert report was disclosed. Spajic Dec. ¶17 Such
 6 disclosure by Plaintiff and by Harbor Freight was timely.

7 Because FRCP 26(a)(2) was not violated, and the complete expert opinion was
 8 disclosed within the time set by the court, there is no basis for sanctions under FRCP 37(c).
 9 Plaintiff cites no authority that supports the requested sanction of witness exclusion where
 10 the witness has been timely disclosed. Such sanction would seemingly moot the expert
 11 disclosure deadline since the claimed failure to disclose allegedly took place six months prior
 12 to the required disclosure date.

13 **B. Plaintiff Did Not Request The Information He Claims Was Withheld**

14 FRCP 37(c) does not provide for sanctions for violations of FRCP 26(b), only FRCP
 15 26(a) and (e). The appropriate "remedy" for an alleged failure to produce documents
 16 responsive to FRCP 33 or 34 interrogatories and requests for production is first that Plaintiff
 17 confers regarding the alleged failures and then files a motion to compel disclosure. However,
 18 Plaintiff's motion argues that Harbor Freight "misrepresented" that the torch was a 91033 in
 19 its discovery responses. Harbor Freight did not make any misrepresentation, and responded
 20 to Plaintiff's discovery requests accurately based on the actual content of the discovery
 21 requests. Harbor Freight has not taken a position in any pleading or discovery response that
 22 the torch actually used by Plaintiff was a 91033 torch. Plaintiff would bear the burden of
 23 proof on this issue, and it is not incumbent upon Harbor Freight to identify for Plaintiff
 24 which torch is at issue.

1 FRCP 33 allows a party to send interrogatories and allows that grounds for an
2 objection to an interrogatory must be stated with specificity. FRCP 34 allows for a request
3 for production of documents or tangible things. Objections to requests are allowed.

4 Plaintiff's request included a definition of "the product" which included two
5 alternative definitions. The first definition was "the product which caused injury or damage
6 to the Plaintiff" and the second was SKU 91033 "as referred to in Interrogatory No. 1."
7 Harbor Freight clearly, completely, and directly objected to the first definition because it
8 included a legal conclusion regarding causation of injury to the Plaintiff. Harbor Freight did
9 not object to Plaintiff's second, more specific, definition of the product in its discovery
10 requests, since it did not contain a legal conclusion and identified the product as the torch
11 identified as SKU 91033. Harbor Freight reasonably interpreted Plaintiff's definitions as
12 referring to the "Torch", SKU 91033, and "the product" as one and the same and produced
13 the relevant information for SKU 91033.

14 Plaintiff's counsel did not call defense counsel to indicate that Harbor Freight's
15 objections were inappropriate or that it invalidated Harbor Freight's responses. Plaintiff's
16 counsel did not propound additional discovery requests to clarify the responses. For
17 example, Plaintiff could have sent Requests for Admissions regarding each SKU, or an
18 interrogatory specifically asking what Harbor Freight determined was the identity of the
19 product purchased by Plaintiff. Instead, Plaintiff sent additional discovery requests
20 requesting hoses from the torch it identified as SKU 91033. If Plaintiff wanted information
21 regarding both SKU numbers to provide to his expert to assist in identification, Plaintiff
22 could have sent requests for production or interrogatories identifying both torches.

23 Defense counsel has no basis for questioning Plaintiff's discovery strategy and no
24 obligation to make sure Plaintiff is asking for what he or his expert require to prepare the
25 case. Plaintiff's counsel chose to request documents related to SKU 91033. Harbor Freight
26 produced those documents. It is not a discovery violation to produce documents as

1 requested. Even if Plaintiff had requested such documents and they were not produced, the
 2 remedy is to “meet and confer” and file a motion to compel if necessary, not an FRCP 37(c)
 3 motion for sanctions.

4 There is no basis for sanctions pursuant to FRCP 37(c) because there is no violation
 5 of FRCP 26, 33, or 34.

6 **C. Harbor Freight Produced Responsive Documents In a Timely Fashion**

7 FRCP 26(a)(1) does not require the production of any documents. Instead, it requires
 8 a copy or a “description by category and location – of all documents, electronically stored
 9 information, and tangible things that the disclosing party has in its possession, custody, or
 10 control and may use to support its claims or defenses.” As described above, Harbor Freight
 11 had no basis for identifying the torch at issue in this litigation except for its expert’s
 12 conclusion. There is no obligation to produce expert opinions at any point prior to the expert
 13 disclosure deadline.

14 FRCP 26(a)(1) and (e) require a party to identify or produce any document it may use
 15 to support its claims or defenses. If such documents or information were not produced
 16 initially, the production may be supplemented “in a timely manner.” Expert disclosures are
 17 to include the facts or data considered by the witness in forming his opinion. In general,
 18 courts consider a production or supplement “timely” if it occurred before a deadline set by
 19 the Court or by a rule. *See Avila v. Willits Env'tl. Remediation Trust*, 633 F.3d 828 (9th
 20 Cir.)(finding production of documents after a court issued deadline was untimely); *Harris v.*
 21 *City of Seattle*, 315 F.Supp.2d 1112 (W.D. Wash. 2004) (Finding that discovery responses
 22 due and depositions set after the discovery cut-off were not timely.) *Rice v. Corr. Med.*
 23 *Servs.*, 675 F.3d 650 (7th Cir. 2012) (Finding that witnesses who were not disclosed as
 24 witnesses until after the close of discovery should be excluded.)

25 Harbor Freight produced its expert report at 4:08 P.M. on December 7, 2018, before
 26 the deadline for producing expert reports set by the court. Dec. Spajic. ¶ 11. Therefore, there

1 is no basis for finding that the expert opinion was not produced in a timely fashion. Upon
2 receiving and producing the expert report, it was clear that Harbor Freight would need to use
3 some documents, relied on by its expert, related to torch 61589 in support of its defense.
4 Those documents, and additional documents related to that torch, were produced to
5 Plaintiff's counsel on December 20, 2018. The discovery cut-off in this case was set for
6 February 14, 2019. Therefore, the supplementation was well within the timeline for
7 production of documents set by the court.

8 Plaintiff indicates that his request for supplementation of discovery in mid-November
9 2018 should have triggered a production of either the expert opinion or other information
10 provided to the Harbor Freight's retained expert. However, a request for supplementation
11 does not alter the court ordered expert disclosure deadline to require earlier disclosure of
12 expert opinions. It also does not eliminate the trial preparation privilege available for
13 communications with experts. The only basis that Harbor Freight had for knowing which
14 product Plaintiff purchased was its expert's opinion. Plaintiff requested supplementation of
15 responses to his Interrogatories and Request for Production. As described above, neither the
16 First nor the Second Request for Production included a request for information about the
17 61589 torch. Therefore, there was nothing to supplement the responses to Plaintiff's
18 discovery request.

19 Once the torch was identified by Harbor Freight's expert, the relevant documents
20 were produced before the rebuttal expert disclosure deadline and well before the discovery
21 cutoff. Plaintiff argues that the "delay" in production was six months from the date of the
22 initial product identification until the expert disclosure. At most any "delay" was between
23 December 7 and December 20, just 9 court days.

24 Because the relevant documents and expert opinion were produced before the expert
25 disclosure deadline, and well before the discovery cut-off, the information Plaintiff seeks was
26

1 timely produced. Where information is timely produced or supplemented, there is no
 2 violation of FRCP 26(a) or (e), and therefore no basis for sanctions.

3 **D. There is No Other Violation of FRCP 26(a) or (e)**

4 There is no basis for any other violation of FRCP 26(a) or (e). Plaintiff's motion
 5 complains that neither defense counsel nor the defense expert told him or his expert that the
 6 exemplar Plaintiff had provided was not the product that Harbor Freight's expert had
 7 concluded was involved. Plaintiff cites no case, and Harbor Freight is not aware of any case,
 8 that would require attorneys or experts at a joint examination to explain to Plaintiff's counsel
 9 or Plaintiff's expert why their opinions differ. This is the purpose of expert reports.
 10 Communications with an expert prior to disclosure are privileged under FRCP 26(a)(4),
 11 therefore there is no basis for requiring the disclosure of those communications. Neither
 12 Plaintiff's counsel nor his expert objected to proceeding without a second exemplar, which
 13 was available if it had been requested. Therefore, there is no violation of FRCP 26(a) or (e)
 14 on this basis.

15 **E. Even If There Was a Violation of FRCP 26 (a) or (e), Plaintiff Has Not
 16 Shown Harm**

17 As described above, there was no violation of FRCP 26(a) or (e), and therefore there
 18 is no basis for a sanction pursuant to FRCP 37(c). However, if the court is inclined to find
 19 that Harbor Freight's expert's opinion or other documents should have been disclosed earlier,
 20 it is within the court's discretion to deny Plaintiff's motion if the failure to disclose was
 21 "harmless" or with "substantial justification."

22 The Court should consider four factors when deciding whether to exclude a witness
 23 pursuant to FRCP 37(c). *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997). These
 24 are "(1) the public's interest in expeditious resolution of litigation, (2) the court's need to
 25 manage its docket, (3) the risk of prejudice to the other parties, (4) the public policy favoring
 26 disposition of cases on their merits, and (5) the availability of less drastic sanctions." *Id.*
 Additionally, if the exclusion of the witness effectively amounts to dismissal of the claim, the

1 exclusion is only appropriate where the noncompliance involved willfulness, fault, or bad
2 faith, and where lesser sanctions are not available. *R&R Sails Inc. v. Ins. Co. of the Pa.*, 673
3 F.3d 1240, 1247 (9th Cir 2012).

4 The Western District of Washington has considered these factors in several cases. A
5 disclosure of expert witnesses 30 days after the expert disclosure deadline, one month before
6 the discovery cutoff, and five months before trial was recently found by this court to be
7 harmless. *Holen v. Jozic*, No. Cl 7-1147 JLR, 2018 U.S.Dist. LEXIS 188479, 2018 WL
8 5761775 (W.D. Wash. Nov. 2, 2018). An expert report disclosed 11 days past the expert
9 disclosure deadline, where discovery cutoff had already past when the court made its ruling,
10 was also considered to be harmless because the party seeking exclusion would have the
11 opportunity to depose the witness and file a motion for summary judgment if desired.
12 *Galentine v. Holland Am. Line-Westours, Inc.*, 333 F.Supp. 2d 991 (W.D. Wash. 2004).
13 Production of documents seven days before the discovery cut-off but two months after a
14 court order to produce all such documents in response to a motion to compel was not timely
15 and was harmful, and the court ordered sanctions. *Heath v. F/V Zolotoi*, 221 F.R.D. 545
16 (W.D. Wash. 2004).

17 This case does not involve an untimely witness disclosure or supplemental
18 production. The trial date has not been moved, and even Plaintiff's requested continuance of
19 the pre-trial discovery deadlines did not include a request for a later trial. Plaintiff has four
20 and a half months from the disclosure until trial, providing plenty of time for any necessary
21 reaction to the expert disclosures and production. This disclosure does not impact the
22 expeditious resolution of the case. Additionally, though the parties stipulated to an
23 extension, the court has maintained its authority to manage its docket and there appears to be
24 no reason that there would be a substantial change to the docket.

25 The prejudice to the Plaintiff, if any, was not unfair and not substantial. Plaintiff
26 could have secured the information he sought via other discovery methods at some earlier

1 date or even through investigation of publicly available websites. Plaintiff was in possession
 2 of the involved torch and packaging, had a fair opportunity to allow his expert to review the
 3 involved torch and come to his conclusions, and bears the burden of proving which torch it
 4 was. The expert disclosure was provided within the time ordered by the court, and allowed
 5 the Plaintiff more than two months from that disclosure to propound discovery requests or
 6 take depositions of the expert or other witnesses. At the time of disclosure he had a month
 7 wherein his expert could conduct additional testing, gather additional information, and create
 8 a rebuttal report in response to Harbor Freight's expert report. Upon Plaintiff's request,
 9 Harbor Freight, even though it did not have to, stipulated to an extension to the discovery
 10 deadlines. Plaintiff may now provide his initial expert report by January 14. The prejudice
 11 to Plaintiff in this case is even less than in *Holen* or *Galentine* because no depositions have
 12 been taken, and there is more than sufficient time for Plaintiff to react.

13 Excluding Harbor Freight's expert John Schumacher's report and testimony, that was
 14 timely disclosed, would work strongly against the public interest favoring resolution of cases
 15 on the merits. The issues in this case, as raised by Plaintiff himself, include the identity of
 16 the product involved, how and if it caused Plaintiff's injuries due to manufacturing or design
 17 defect, and whether the included warnings and instructions were adequate. Expert
 18 Schumacher's opinion will weigh on many of these issues. Excluding the report would make
 19 a resolution on the merits very unlikely and excluding him based on failure to disclose his
 20 opinion earlier than required would be wholly and unduly prejudicial.

21 Because the alleged late disclosure was harmless and substantially justified, the court
 22 should not grant Plaintiff's Motion for Sanctions.

23 V. CONCLUSION

24 Because there was no violation of the disclosure requirements of FRCP 26(a) or (e), the
 25 Court should deny Plaintiff's Motion for Discovery Related Sanctions.

1 Dated this 7th day of January, 2019.

2 GORDON & POLSCER, LLC

3
4 By: _____
5 Robert Spajic, WSBA # 22383
6 bspajic@gordon-polscer.com

7 *Attorneys for Defendant Harbor Freight Tools*
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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2019, I electronically filed this **RESPONSE TO PLAINTIFF'S MOTION FOR DISCOVERY RELATED SANCTIONS** with the Court using the CM/ECF system which will send notification of such filing to the following:

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Attorneys for Plaintiff Brandon Austin

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this _____ day of January, 2019.

GORDON & POLSCER, LLC

By: _____

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bspajic@gordon-polscer.com

Attorneys for Defendant Harbor Freight Tools